

S T A T E R E P O R T E R
■ O F
E D U C A T I O N L A W
VOLUME 7

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF MONTANA:

NICK MCCUIN,

Appellant,

v.

NO. OSPI 101-86

Decided: Dec. 30, 1988

VALIER SCHOOL DISTRICT #18,

Respondent.

Findings of Fact, Conclusions of Law and Order by John Larson, Hearings Officer, and adopted by Ed Argenbright, State Superintendent.

Appeal from Pondera County Superintendent of Schools.

TRANSPORTATION--CONTRACTS, Whether bus driver was denied due process considerations where school board denied recertification of bus driver who was also contractor for providing bus services.

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This controversy arises from a decision made on April 3, 1985 when the Respondent Board of Trustees voted to remove appellant McCuin as a school bus driver in the Valier school District. Subsequently, on June 11, 1985, the School Board refused to recertify McCuin as a school bus driver for the District. Although notified, McCuin was not present at either public meeting of the School Board.

A variety of appeals subsequently reached the Pondera County Transportation Committee and the Pondera County Superintendent. The County Transportation Committee and County Superintendent affirmed the actions of the Valier School Board without holding a hearing. Two appeals were then filed with the State Superintendent (OSPI 90-85 and OSPI 91-85). The State Superintendent combined the two appeals and designated the consolidated case as OSPI 101-86.

On February 4, 1986, the State Superintendent of Public Instruction remanded this matter to the Pondera County Transportation Committee with specific instructions on conducting a due process hearing before the Committee. The Transportation Committee received a partial stipulated agreement of facts, together with a motion for summary judgment from the affidavit, and from this stipulation entered Findings of Fact, Conclusions of Law and Order, which again affirmed the Valier School Board's actions.

The matter was once again appealed to the State Superintendent of Public Instruction and on May 14, 1987, the State Superintendent issued an order directing the parties to attempt a settlement of the dispute. If a settlement could not be reached, the State Superintendent informed the parties that he would appoint a hearings examiner to conduct a hearing and render a decision in this matter. The parties were unable to reach a settlement and the State Superintendent appointed John W. Larson as a hearings examiner.

Following briefs and oral arguments on prehearing legal issues, the hearings examiner entered a "Memorandum and Order" on July 1, 1988. Following additional briefs and arguments, the hearing in this matter was held on November 28 and 29, 1988 at the Pondera County Courthouse in Conrad, Montana. The issue of damages was liquidated and reserved pending this decision.

Appellant was present and represented by John Wuerthner, Esq., P.O. Box 2503, Great Falls, Montana 59403. The Respondent School District was present and was represented by Charles Erdmann, Esq., Erdmann & Wright, P.O. Box 5418, Helena, Montana 59604. Witnesses were heard and evidence was taken. The hearings examiner requested simultaneous briefs, proposed Findings of Fact, Conclusions of Law, and simultaneous reply briefs. A transcript of the hearing has been completed and has been reviewed by the hearings examiner. Upon review of the record and briefs, and being fully advised in the process, this hearings examiner enters the following:

FINDINGS OF FACT

1. Appellant Nick McCuin entered into a transportation contract with the Respondent School District on June 27, 1983 for the "Heart

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Butte Route." McCuin furnished a bus pursuant to the contract and hired himself to be the bus driver.

2. The Respondent is School District No. 18, Pondera County, which is a duly constituted school district under the laws of the state and operates an elementary school and high school in Valier, Montana.

3. To comply with the contractual requirements, Appellant was required to provide "...at all times properly certified and competent drivers approved by the Board of Trustees of the District..."

4. The evidence indicated that the School District started receiving complaints concerning McCuin's conduct as a bus driver almost as soon as he took over the bus route. The parents, Trustees, and Superintendent all testified that bus drivers who drove the route prior to and after McCuin did not encounter the same difficulties as did Mr. McCuin.

5. In April 1984, the School District was contacted by Eloise England who complained that her nephew and several other students had been dropped off several miles from her home. Mrs. England testified that she specifically remembered this incident since she was waiting for her nephew to return home so that they could attend a basketball tournament .

6. In September 1984, the Benzing family complained to the School District about McCuin not waiting for their children at the bus stop, even though he saw them coming. Both Craig Benzing, a student, and his father, Oran Benzing, testified as to two separate incidents where McCuin knew, or should have known, that the students were approaching the bus and did not stop. On one occasion, Craig Benzing dropped some candy bars prior to getting on the bus and when he stopped to pick them up, McCuin closed the bus door and drove off.

7. In September, the School Board met in a special meeting to discuss their concerns with student safety and discipline on the Heart Butte route. McCuin was in attendance at the meeting and after discussion with the Board was presented with the following alternative:

(1) Hire another bus driver approved by the Board to carry out the duties of transporting students between Heart Butte and Valier.

(2) Negotiate the sale of the bus between the Board and contractor and drop the contract.

(3) Follow the policies of this Board and the rules, regulations and laws of this state with regard to student discipline and safety.

At the conclusion of the meeting, McCuin chose Option (3).

8. In December 1984, McCuin was involved in a bus incident where a student, Rachelle Williamson, was almost run over by the bus as she was walking along side the bus and McCuin started to drive off. Rachelle's mother, Vicki Williamson, also testified that McCuin would

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not stop at their bus stop.

9. In January 1985, two Trustees met with the McCuins to discuss the Trustee's concerns with the Valier school bus transportation program. As a result of this meeting, the Trustees returned to the February meeting with 18 specific recommendations. The Board addressed these recommendations and took action where appropriate.

10. The evidence indicates that McCuin continued to have difficulty with disciplinary problems in February and March 1985.

11. In March, Bill Rappold, the Trustee who represented the Heart Butte area, was contacted by Duane Rutherford concerning an incident where McCuin slammed on the brakes of his bus in order to get the students' attention. Both Nicole and Duane Rutherford, Jr. testified as to this incident at the hearing. Mr. McCuin admitted that the incident occurred, but minimized its effect on the children on the bus. Nicole testified that she hit her head on the seat in front of her and then slid to the floor. McCuin appears to have taken this action solely for the purpose of getting the students' attention. Testimony indicated that this "brake slamming" incident occurred more than once.

12. The Chairman of the School Board called for a special school board meeting for Wednesday, April 3, at 7:00 p.m. to discuss the Trustees' continuing concern with student discipline and safety problems on the Heart Butte route. The Superintendent attempted to contact McCuin on Friday, March 29, but was unable to contact him until Sunday, March 31. At that time, McCuin was informed that the Trustees would be holding a special meeting the following Wednesday evening to discuss the Heart Butte route.

13. The Superintendent further informed Mr. McCuin that he could pick up the list of incidents at the school on Monday morning. McCuin testified that he picked up the incident list and further testified that he had received notice of the meeting either in person or through the mail.

14. On Tuesday, April 2, McCuin called the Superintendent and informed him that his attorney could not be there for the meeting and that he would like a postponement. The Superintendent informed him that he could not postpone the meeting and that it would be held as scheduled. McCuin testified that the Superintendent made it clear that the meeting would proceed.

15. The agenda of the meeting (Respondent's Exhibit #7) was introduced and sets forth the concerns of the School District as follows:

- (1) Safety of students.
- (2) Disruption of school process.
- (3) The inability to manage students.
- (4) Liability of the school system.

16. Mr. McCuin chose not to attend the meeting and did not send

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anyone to represent his interests.

17. The Trustees testified that they were not prepared to postpone the meeting due to the immediacy of the safety problems on the Heart Butte bus route. They did indicate their disappointment in McCuin not being present at the meeting but felt that he had ample opportunity to attend and respond to the District's concerns.

18. The April 3 meeting was attended by 27 individuals and the Board listened to testimony from parents, bus drivers, and the school administration for two and one-half hours .

19. The testimony indicated that the Board's authority to remove McCuin as a bus driver under the contract was discussed by the School Board. In addition, the County attorney offered several statutes as additional authority for the Board's actions.

20. The Board considered the following options:

- (1) Relieve McCuin of the contract:
- (2) Suspend McCuin as the driver:
- (3) Give McCuin another warning;
- (4) Just forget about the incident, while noting
McCuin had already had three warnings.

21. A motion was made by Roger Christianes to remove McCuin as a bus driver. The specific language contained in the minutes is as follows:

"A notion was made by Roger Christianes, seconded by Bill Rappold, to dismiss Nick McCuin as a bus driver and suspend him permanently as a bus driver for this school district. All voted in favor of the motion.

"* * *

"It will be McCuin's responsibility to find a suitable driver to replace him and pay his wages."

22. The following day, the Superintendent wrote McCuin a letter dated April 4, 1985 (Respondent's Exhibit #8) informing him of the Board's decision.

23. The testimony indicated that the Trustees were aware of their authority to act under the contract and acted pursuant to that authority.

24. In May 1985, McCuin submitted a new medical certificate for his recertification as a school bus driver for the Valier School District. The medical certification was not on a proper form approved by the Superintendent of Public Instruction and, therefore, the Board deferred action on the request. Both Mr. McCuin and his attorney were present at the June meeting.

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25. On June 5, 1985, the District Superintendent wrote to Mr. McCuin informing him that his request for recertification had been placed on the agenda for the June 11, 1985 meeting (Respondent's Exhibit #9). The letter urged Mr. McCuin to be represented at the meeting.

26. The minutes of the June 11, 1985 meeting indicate that Mr. McCuin did not attend, even though notified, and that the School Board declined to take any action: therefore, effectively denying McCuin's request for recertification.

27. The Trustees testified that they specifically discussed Section 20-10-103(2) at the June 11, 1985 board meeting and took their action based on concerns of Mr. McCuin's "moral character."

28. The deficiencies and shortcomings noted in the State Superintendent's Order of May 14, 1987 have been addressed by the hearing and by the Findings, Conclusions, and Order herein.

29. This hearings officer adopts as Findings of Fact any matters of fact which may be included in the Conclusions of Law below.

From the Findings of Fact, the hearings examiner draws the following:

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact incorporate Conclusions of Law or the application of law to fact, they are incorporated herein as Conclusions of Law.

2. The hearings examiner has jurisdiction pursuant to Section 20-3-107, MCA, and the State Superintendent of Public Instruction's Order dated May 14, 1987 and subsequent appointment by the State Superintendent of John W. Larson as hearings examiner.

3. The hearings examiner conducted a hearing de novo on November 28 and 29, 1988 in Conrad, Montana.

4. The Respondent School District contracted with Appellant McCuin to provide transportation services under Section 20-10-124, MCA. McCuin, as an independent contractor with the School District, then hired himself as the bus driver and, therefore, became an employee of the contractor.

5. Section 20-10-104(2), MCA, is inapplicable to these controversies because they are directed to the employee of the contractor.

6. Paragraph 3 of the transportation contract (Respondent's Exhibit #2) provides the School Board with the authority to remove their approval of a driver who no longer is "competent."

7. The Trustees were aware of this authority and relied upon it at the April 3, 1985 School Board meeting. The Trustees acted pursuant

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to this contractual authority, although they also referenced two statutes at the recommendation of the county attorney.

8. The statutory references appear not to apply to this situation, but do not diminish the authority of the School Board to act under the contractual provisions.

9. The evidence established that the School Board had ample grounds for the actions that it took in removing McCuin as a bus driver on the Heart Butte route. These grounds include concerns over McCuin's inability to effectively administer discipline, concerns over the safety of students of the Heart Butte route, concerns over the disproportionate amount of time the administration was spending in dealing with McCuin's disciplinary problems, and the financial liability of the school District.

10. The State Superintendent of Public Instruction has specifically held that the safety of students in the transportation area is a paramount concern of the School Board. Seidel v. Board of Trustees, OSPI 97-86, 5 Ed Law 184 (1986).

11. Trustees can testify at later hearings to clarify matters not clearly set forth in School Board minutes. Sonsteli v. Trustees, School District #10, Flathead County, 202 Mont. 414, 658 P.2d 413 (1983).

12. Since the Trustees were aware of and acted pursuant to the contractual provisions at the April 3, 1985 meeting, they can legitimately rely on the basis in this proceeding.

13. McCuin was not an employee of the School District. McCuin, as a bus driver, was an employee of McCuin, the independent contractor. There is no evidence that a written contract existed between "McCuin the bus driver" and "McCuin the independent contractor." In the absence of a written contract, Section 39-2-503 governs their employment relationship.

14. The Montana Supreme Court has held in Reiter v. Yellowstone County, Mont._____, 627 P.2d 845 (1981) that an employee who does not have an employment contract setting forth a specific term of service falls under section 39-2-503 and further that those employees do not have a property interest protected by the U.S. or Montana Constitutions.

15. A protected property interest must be established before there can be questions of whether due process protection has been violated. Akhtar v. Van De Wetering, 197 Mont. 205, 642 P.2d 149 (1982).

16. Since the School Board did not employ McCuin as a bus driver, and since McCuin was employed as an at-will employee by the contractor, he did not have a property interest protected by the U.S. or Montana Constitutions and, therefore, no review of due process considerations is triggered.

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17. Assuming that the District did owe McCuin due process considerations, given the immediacy of the School Board's concern over student safety on the Heart Butte route, I find that the notice and opportunity for hearing would have satisfied any due process required under the test set forth in *Matthews v. Eldridge*, 424 U.S. 319 (1976).

18. The Respondent School Board, at the June 11, 1985 meeting, acted properly pursuant to Section 20-10-103 to deny recertification of McCuin's bus driver certificate for the Valier School District. Again, McCuin had proper notice and opportunity to appear before the Board.

19. Laches does not apply to the School District's action in these controversies.

20. The appellant has not established the element of estoppel to be applied against the School District.

21. This hearings examiner has no jurisdiction to hear or determine any matters concerning any alleged tort or wrongful discharge.

The Hearing Examiner has reviewed all of the Proposed Findings of Fact, Conclusions of Law and those which have not been specifically adopted above and are hereby rejected.

From these Findings of Fact and Conclusions of Law, this Hearing Examiner now enters this

ORDER

The decisions of the Valier School District which are the subjects of these appeals (April 3, 1985 and June 11, 1985) are hereby affirmed and the appeals of Nick McCuin are dismissed.

Dated this 30th day of December, 1988.

s/John W. Larson
Hearing Examiner

Approved and adopted this 30th day of December, 1988.

s/ED ARGENBRIGHT
State Superintendent

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